IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27180-3-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
FELIX R. COLON,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. — Felix Robert Colon appeals his first degree theft conviction, contending the trial court reversibly erred under ER 403 and ER 404(b) in allowing certain post-event evidence. We disagree, reject Mr. Colon's additional review grounds, and affirm.

FACTS

In the spring of 2007, two individuals, including Mr. Colon, were seen in a transformer storage area at Spokane Falls Community College (the College) by Arden Crawford, the College facilities manager. There, Mr. Crawford saw a small utility trailer with a transformer on it and two nearby parked cars. Mr. Crawford approached and asked the pair who had given them permission to take the transformer. One person

then left, but Mr. Colon stayed and admitted no one had given permission. Mr. Colon explained he thought the transformers were for recycling and removed the transformer from the trailer before leaving without it.

The State charged Mr. Colon with one count of first degree theft of an electrical transformer belonging to the College and one count of malicious mischief.[1]

Mr. Colon's motion in limine was heard on the morning of his jury trial. The trial court generally ruled that no prior bad acts would be admitted under ER 404(b). Mr. Colon then specifically asked that information "about [him] allegedly being found near or in a trash dumpster" be excluded, as irrelevant and prejudicial. 1 Report of Proceedings (RP) (Mar. 25, 2008) at 15. The State described the evidence as follows:

> [O]n a date subsequent to this case, Mr. Colon was found in a dumpster. Mr. Crawford ordered him out . . . recognized him. . . . [m]y offer of proof would be that Mr. Crawford said: Don't we know each other? Mr. Colon replied that they did. Mr. Crawford said it was that transformer business, wasn't it? And Mr. Colon responded in the affirmative.

1 RP (Mar. 25, 2008) at 16.

The State asserted it would seek to admit this evidence, not as a prior bad act, but as a conversation with a third-party. Specifically, "[i]t's a confession to a third-party who is not law enforcement that goes directly to the heart of this case." 1 RP (Mar. 25, 2008) at 16. Mr. Colon argued for full exclusion, stating "it's just not relevant to this situation and the State would introduce this entire transaction to prejudice the jury thinking [sic] that Mr. Colon is all over [the College] doing all kinds of thefts when the

[1] The malicious mischief charge was dismissed at the end of the State's case.

information charges things only dealing with transformers." 1 RP (Mar. 25, 2008) at 18. The trial court prohibited the parties from mentioning the dumpster evidence in their opening statements, and reserved ruling on the issue until the case developed.

At trial, Mr. Crawford testified that the College did not give Mr. Colon permission to take the transformer. Mr. Crawford related, "I think the value of a transformer is about $2100." 1 RP (Mar. 25, 2008) at 53. The State asked Mr. Crawford first, whether he had contact with, and second, whether he saw, Mr. Colon in the dumpster. Mr. Colon unsuccessfully objected on relevancy grounds. The court admitted the following:

> [The State:] Have you ever seen Mr. Colon in between the early morning that you saw him with the transformer and today in court?
> [Mr. Crawford:] Yes.
> [The State:] Can you describe that encounter between yourself and Mr. Colon?
> [Mr. Crawford:] Mr. Colon was in a dumpster behind the maintenance storage or the warehouse building and that was in about July time frame [sic].
> [The State:] You personally saw him there?
> [Mr. Crawford:] Yes.
> [The State:] And did Mr. Colon make any statements to you during the course of that encounter?
> [Mr. Crawford:] Yes.
> [The State:] Can you describe the conversation you had with Mr. Colon at that time?
> [Mr. Crawford:] . . . I said, "You and I have met before." And he said, "Yes, with the transformers."

1 RP (Mar. 25, 2008) at 57. Mr. Colon cross-examined Mr. Crawford on this topic.

Spokane Police Detective Harlan Harden testified about his telephone conversation with Mr. Colon:

> [D]uring April of this year, which would have been 2007, . . . he was at

> [the College] and he had loaded a transformer from the property of [the College] onto a trailer pulled by his truck. And he said that he did not have permission to do this. And he also mentioned that he was contacted by security, at which point he unloaded the transformer.

1 RP (Mar. 25, 2008) at 78. Mr. Colon gave a written statement to Detective Harden that was admitted and read into evidence. It partly states:

> I am writing this letter to explain the circumstances that happened on April 7, 2007, at [the College].
>
> My friend told me there were some old transformers not being used by the school for scrapping purposes. I went with him. When I was at the location of the transformer, an employee of the school questioned my doings. I explained to him of my friend [sic], whom has scraped [sic] transformers before, and that all I was doing was the same.
>
> I put the transformer back.

1 RP (Mar. 25, 2008) at 79-80. The jury found Mr. Colon guilty of first degree theft. Mr. Colon appealed.

ANALYSIS

A. Post-Event Dumpster Testimony

The issue is whether the trial court reversibly erred in admitting Mr. Crawford's post-event testimony about seeing Mr. Colon in the dumpster in July 2007.

A trial court's decision regarding admissibility of evidence is reviewed under an abuse of discretion standard. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). "When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists." *Id*.

Mr. Colon first contends the challenged evidence was inadmissible under ER

404(b). However, the State did not argue for admission of this evidence below based on ER 404(b), nor did Mr. Colon argue for its exclusion under this rule. Evidentiary errors under ER 404(b) are not of constitutional magnitude, and, therefore, cannot be raised for first time on appeal. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Because the trial court was not asked to rule under ER 404(b), we have nothing to review.

Next, Mr. Colon contends the challenged evidence was irrelevant and its prejudicial effect outweighed its probative value. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible." *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006) (citing *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)). Further, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

Here, Mr. Crawford's testimony that when he told Mr. Colon, "[y]ou and I have met before," Mr. Colon responded, "[y]es, with the transformers" may have been relevant to prove identity, specifically, that Mr. Colon was the perpetrator of the incident

in question. 1 RP (Mar. 25, 2008) at 57. But that Mr. Crawford saw Mr. Colon in a dumpster is a separate inquiry. The State argues this evidence "was relevant to disprove [Mr. Colon's] claim that he had mistakenly believed that the transformers had been abandoned." Resp't Br. at 6. This is a tenuous connection at best, considering the charged event took place several months earlier.

The court did not perform a formal balancing under ER 403. We cannot say the prejudicial effect of Mr. Crawford's challenged testimony did not outweigh its probative value. The jury could have assumed because Mr. Colon was in a dumpster, he was taking property belonging to the College for his own purposes, and therefore, he did the same with the transformer in question.[2] Even so, "[a]n error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). "'[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *Id*. (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *Id*.

Examining the remaining evidence before the jury, we are persuaded the result would not have been materially affected absent the challenged testimony of Mr.

[2] On cross-examination, Mr. Crawford testified Mr. Colon had a pick-up truck with him on the day he was in the dumpster, and the truck contained dumpster items.

Crawford. Mr. Crawford testified he saw Mr. Colon in the college's transformer storage area, near a small utility trailer with a transformer on it, and that the College had not given Mr. Colon permission to take the transformer. Detective Harden testified Mr. Colon informed him, in their phone conversation, that he loaded the transformer onto the trailer, without permission. The detective testified Mr. Colon gave him a written statement, admitting his involvement in the incident. The challenged evidence is of minor significance considering all evidence. *See Bourgeois*, 133 Wn.2d at 403. Considering all, any error in admitting Mr. Crawford's testimony was harmless.

B. Additional Grounds

Mr. Colon raises two issues in his statement of additional grounds (SAG). First, Mr. Colon contends Detective Harden induced him to give a written statement by telling him only a simple citation would be issued. However, nothing in the record supports this argument. Our review is limited to issues contained in the record. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (stating "[w]here . . . the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record"). If other facts exist supporting Mr. Colon's contention, they may be presented in a personal restraint petition. *Id*.

Second, Mr. Colon appears to argue insufficient evidence supported his first degree theft conviction. He asserts: "[t]here was never a theft that occurred that morning. Pehaps [sic] an '[a]ttempted theft' is more like it." SAG at 1.

The evidence sufficiency test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). Further, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *Id*. (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). And, "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A defendant is guilty of first degree theft if he commits theft of property exceeding $1,500 in value. RCW 9A.56.030(1)(a). Theft is defined as "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a). Further, an attempt requires only that the defendant take a substantial step toward committing the crime in question. RCW 9A.28.020(1).

Here, Mr. Crawford testified he saw Mr. Colon near the trailer with a transformer on it, and that the College had not given Mr. Colon permission to take the transformer.

Detective Harden testified Mr. Colon informed him, in their telephone conversation, that he loaded the transformer onto the trailer without permission. Mr. Crawford estimated the value of a transformer at $2,100.

Viewing this evidence in the light most favorable to the State, any rational trier of fact could have found Mr. Colon's guilt beyond a reasonable doubt. Although Mr. Colon did not leave the premises with the transformer, intent to "permanently" deprive is not an element of the theft statute. *See State v. Komok*, 113 Wn.2d 810, 816-17, 783 P.2d 1061 (1989). Accordingly, the evidence was sufficient to support Mr. Colon's conviction of first degree theft.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Schultheis, C.J.

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Sweeney, J.